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In the Supreme Court of the United States

October Term, 1980

ROBBINS & MYERS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 25, 1981

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may deprive an employer of his right to express pre-election views on unionization solely because, in an environment free of any unfair labor practices, he makes a partisan speech referring to sections of federal labor laws which support his position but does not allude to other sections which do not support his position.

2. Whether an employer may rely upon the prior approval of particular language by the courts and Board when presenting his pre-election speech to employee voters.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Robbins & Myers, Inc.,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 11, 1980.

OPINION BELOW

The as yet unreported opinion of the Court of Appeals enforcing the Board's order appears in the Appendix hereto. (App. A) The supplemental opinion and order of the National Labor Relations Board appears at 241 N.L.R.B. No. 11 (1979). (App. B)

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1. In accordance with Supreme Court Rule 28.1, the petitioner states that it has no parent, subsidiary (other than wholly owned), or affiliated companies.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 11, 1980. On January 27, 1981, the Court of Appeals entered an order staying issuance of the mandate for thirty days. This petition for writ of certiorari was filed within 90 days of judgment and within 30 days of the stay. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution: Amendment I:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Code, Title 29:

> §158(c)
>
> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.
>
> §159(a)
>
> Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such

purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

§159(c)

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of

representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT OF THE CASE

1. Procedural History

The National Labor Relations Board scheduled a representation election at the Robbins & Myers, Inc. plant located at Gallipolis, Ohio, for November 27, 1974.[2] Prior to this election, the Employer sent employees a letter expressing its opposition to the Union. The Employer's plant manager, Hennessey, also delivered a speech to all employees in which he essentially reiterated the theme of the letter. (App. C)

When the Union lost the election it filed objections in which it contended that both the letter and the speech contained improper threats and promises. The objections relating to the letter were subsequently sustained by the Board. The Union later won a rerun election.

In order to obtain court review of the Board's decision overturning the earlier November 27, 1974 election, the Employer declined to bargain with the Union. By order of the Board dated October 21, 1976, the Employer was found to have committed an unlawful refusal to bargain, violating Section 8(a)(5) of the Act. *Robbins & Myers, Inc.*, 226 N.L.R.B. 544 (1976).

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2. A prior election won by the Union on February 21, 1974, had been overturned by the Board because of Union misconduct.

The Company thereupon petitioned the United States Court of Appeals for the Sixth Circuit for review of the Board's order. In an order dated June 20, 1978, the Court reversed the Board's finding that the Company's letter illegally threatened economic sanctions and offered promises. *Robbins & Myers, Inc. v. NLRB*, 577 F.2d 382 (6th Cir. 1978). The Board's order was set aside and the matter remanded for further proceedings regarding unresolved Union objections relating to the plant manager's speech.

On March 16, 1979, the Board issued a supplemental decision sustaining the Union's remaining objections to the second election. *Robbins & Myers, Inc.*, 241 N.L.R.B. No. 11. (App. B) The Board majority found that the November 27, 1974 election had been correctly set aside because it concluded that three statements made during the pre-election speech by plant manager Hennessey, while not coercive or threatening, nevertheless constituted substantial misrepresentations. The Board's certification of the Union was reaffirmed. The dissenting opinion expressed agreement with previous Board policy on "misrepresentations". (App. B at p. A14)

The Company thereupon petitioned the United States Court of Appeals for the Sixth Circuit for review of the Board's order. In an order dated December 11, 1980, the Court affirmed the Board majority's finding that the Company's statements constituted substantial misrepresentations. (App. A)

2. Alleged Material Misrepresentations

Plant manager Hennessey's first alleged misrepresentation was:

> "What the pushers have not told you, and hope you do not realize, is that once a union gets in, there

is basically no turning back—you are stuck with it from then on." (App. C at p. A15).

The Board panel majority found this statement objectionable because it failed to describe the details of the decertification provision of 29 U.S.C. §159(c).

Hennessey's second alleged misrepresentation was:

"A union is nothing more than an outsider. When this outsider comes on the scene the employees lose all rights for direct communication with the Company. If the union comes in, the final negotiated contract is between the Company and the International Union. You, or your local would have no authority to enter into a contract with the Company. By law, our dealings are with the International Union." (App. C at p. A15)

This statement was found objectionable because it failed to outline the proviso to 29 U.S.C. §159(a) permitting employers to receive employee grievances so long as the union may be present and has no objections.

Hennessey's third alleged misrepresentation was:

"If the Union is elected, there are usually two things that they go after:

1. The first thing they go after is a closed shop. Closed shop means that the Company agrees that no non-union (non-excluded) employees will be employed by the Company—and everyone is union." (App. C at p. A22)

This statement was found objectionable essentially because, in the Board's opinion, the plant manager's use of "closed" rather than "union" implied the Union would seek an unlawful union security arrangement.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of the United States Supreme Court Because It Deprives the Petitioner Employer of Its Protected Right of Free Speech

The opinion of the Board, enforced by the Court of Appeals, drastically restricts employer free speech during NLRB election campaigns. The Board has thereby curtailed a right of free speech which "is as important, if not more so, than that of the union seeking to represent the employee."[3] Specifically, the Board's opinion forbids an employer to inform its employees of burdens which will be lawfully imposed upon them should they select union representation, unless the employer also presents a detailed discussion of all arguably related statutory rights and benefits provided under the Act. The Board's position effectively prevents employers from making any statements regarding employee rights under the Act for fear that, at a later review by the Board, it will be determined that the employer's description of employee rights was not as complete as the Board would prefer.

Such a result is in direct conflict with the purpose and intent of the federal labor policy as enunciated by this Court. In a libel suit growing out of an NLRB representation election, *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 62-63 (1964), this Court wrote:

> We acknowledge that the enactment of §8(c) manifests a Congressional intent to encourage free debate on issues dividing labor and management. And, as we

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3. *NLRB v. General Telephone Directory Co.*, 602 F.2d 912, 915 (9th Cir. 1979).

> stated in another context, cases involving speech are considered 'against the background of a profound . . . commitment to the principle that the debate . . . should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. *New York Times Co. v. Sullivan*, 367 U.S. 254, 270 (1964).
>
> Such considerations likewise weigh heavily here; *the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.* (Emphasis added; footnote omitted).

Similarly, this Court, quoting extensively from *Linn*, wrote in *National Association of Letter Carriers, Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 272 (1974):

> This free-wheeling use of the written and spoken word, we found, has been expressly fostered by Congress and approved by the NLRB. Thus, Mr. Justice Clark acknowledged that there was 'a Congressional intent to encourage free debate on issues dividing labor and management,' [*Linn*], at 62, and noted that 'the Board has given frequent consideration to the type of statements circulated during labor controversies, and . . . it has allowed wide latitude to the competing parties. [*Linn*] at 60.'

To the same effect is this Court's statement in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969):

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'

The Board did not, and indeed, could not, find that the "misrepresentations" made in the present case con-

stituted "deliberate or reckless untruths." Moreover, the Board acknowledged that the "misrepresentations" did not constitute a "threat of reprisal or force or promise of benefit." Indeed, the Board majority admitted that any one of these three statements standing alone "might not warrant setting aside the election." (App. B at p. A13)

The Board has simply concluded that, despite the absence of any unlawful conduct, the plant manager's failure to fully explicate the law relating to these topics was sufficient reason to deprive the Employer of its right to communicate freely with its employees and to deprive those employees of their right to be informed of arguments against, as well as for, unionization. The Court of Appeals, in approving the Board's determination, has thus sanctioned the limitation of employer free speech far beyond the limits permitted by the First Amendment, Section 8(c) of the Act, and by the decisions of this Court.

2. The Decision Below Conflicts With Prior Judicial and Administrative Authority.

A. The Board has previously held unobjectionable similar employer statements regarding Section 9(c) of the Act.

In *Northlake Convalescent Hospital*, 173 N.L.R.B. 992 (1968), the Board reviewed an employer's campaign statement: "once you vote, you will have had your only chance to assert the personal freedom which you now enjoy." The Board held that while the statement was "ambiguous," it certainly "did not constitute such a misrepresentation as would impair a free expression of choice by the employees." 173 N.L.R.B. at 992.

Hennessey could certainly rely on *Northlake* when he made his virtually identical statement that there is "basi-

cally no turning back." The Board disagreed, concluding without any supporting analysis that this statement was likely to have a significant impact.

B. The plant manager's reference to employee grievances in a union context merely repeats prior approved statements.

This Court has previously explained with the utmost clarity the meaning of 29 U.S.C. §159(a). In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, *rehearing denied*, 389 U.S. 892 (1955), this Court held:

> The policy [of the NLRA] therefore *extinguishes the individual employee's power to order his own relations with his employer* and creates a power vested in the chosen representative to act in the interest of all employees . . . . Thus only the union may contract the employee's terms and conditions of employment, *and provisions for processing his grievances;* the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. (Footnotes omitted; emphasis added).

This conclusion was echoed in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61, n.12 (1975), where the Court, refusing to require employers to entertain individual grievances, interpreted the proviso of 29 U.S.C. §159(a):

> The intendment of the proviso is to permit employees to present grievances *and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the exclusive bargaining representative, a violation of*

> §8(a)(5). *The Act nowhere protects this "right" by making it an unfair labor practice* for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion. (Citation omitted; emphasis added).

Recognizing this principle, employer comments like "if the Union won it would be the sole spokesman of employees in grievance matters"[4] or "if this Union were to get in here, this freedom and this right [to speak directly to management] would be taken away from you and placed in the hands of the Unions" consistently have been found permissible.[5]

The Board's conclusion here, adopted by the Court of Appeals, that Hennessey's second statement tainted the election "by erroneously exaggerating the extent to which the employees lose their individual rights to the collective representative" (App. B at p. A11) is in open conflict with all prior authority.

C. The Board has previously permitted employers to refer to "closed" rather than "union" shops.

The Board has previously found unobjectionable a layman's use of "closed" rather than "union" in predicting the sort of security arrangement a union is likely to seek if it becomes the employees' representative.[6] The Board has also found unobjectionable employer descriptions which

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4. *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1254 (5th Cir. 1978).

5. *Bostitch Div. of Textron, Inc.*, 176 N.L.R.B. 377, 379 (1969). *See, e.g., TRW - United Greenfield Div.*, 245 N.L.R.B. No. 147 at pp. 16-19 (1979); *C & K Coal Co.*, 195 N.L.R.B. 1038 (1972); *Allied Stores of New York, Inc.*, 197 N.L.R.B. 718, 723 (1972).

6. *Pollock Mill Co.*, 104 N.L.R.B. 227, 230 (1953).

are "not wholly correct as to the legal impact of a union security clause . . . ."[7]

Ignoring its own prior authority, the Board here concluded, again without any supporting analysis, that Hennessey's accidental use of "closed" when he meant "union" left "the impression with the employees that if they exercise a protected right they risk losing their jobs." (App. B at p. A12)

D. The Board and Sixth Circuit's "aggregating" of individually significant objections conflicts with prior appellate authority.

In reaffirming its decision to set aside the second election, the Board specifically held:

> Although we recognize that in some circumstances each of the misrepresentations made here might not warrant setting aside the election, we conclude that in this case, for the reasons stated above, *these misrepresentations occurring together* are a proper basis for setting aside the second election. (App. B at p. A13) (Emphasis added)

The Court of Appeals affirmed the Board's finding based upon "the cumulative effect of these misrepresentations . . . ." (App. A at p. A2)

The First Circuit has refused to aggregate insubstantial objections to support a Board decision setting aside an election. In *Melrose-Wakefield Hospital v. NLRB*, 615 F.2d 563 (1st Cir. 1980), the First Circuit, analyzing the effect of multiple "misrepresentations" on an election cam-

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7. *Big "D" Mining*, 222 N.L.R.B. 522, 523 (1976). *Accord, Edward A. Utlaut Memorial Hospital*, 249 N.L.R.B. No. 162 at pp. 10-11 (1980); *Montana Lumber Sales, Inc.*, 185 N.L.R.B. 46, 47 (1970).

paign free of any unfair labor practices, rejected the argument that the collective impact of individually unsubstantial "misrepresentations" warranted setting aside an election:

> However, for the Board to abuse its discretion by not finding that the totality of a party's conduct, no single component of which is legally objectionable, requires a new election, the complaint must, at a minimum, offer the Board detailed evidence of the pattern the activity formed and its influence on the election. The tactic of making multiple inadequate objections to an election and aggregating them in a "totality" argument can rarely succeed absent this detailed evidentiary showing. We are not prepared to assume that puffs of this sort indicate the existence of any flame. 615 F.2d at 570-71.

The decision of the Court of Appeals for the Sixth Circuit, affirming the Board's "aggregating" of these individually unobjectionable statements is thus in direct conflict with the position of the First Circuit.

E. There is no showing that the plant manager had exclusive knowledge of his topics.

Moreover, the Board itself, with Court approval, has previously refused to set aside elections absent a showing that alleged misrepresentations were "within the special knowledge of the campaigner." *General Knit of California, Inc.*, 239 N.L.R.B. 619, 620 (1978); *Hollywood Ceramics Co., Inc.*, 140 N.L.R.B. 221, 223 (1962); *Diamond Electronics Division of Arvin Systems, Inc. v. NLRB*, 570 F.2d 156 (6th Cir. 1978). Never before has the Board decided, as it implicitly did here, that the interpretation of federal or state labor laws is such a matter "within the special

knowledge" of the employer. To the contrary, the Board has repeatedly held that issues of legal interpretation are *not* matters within the special knowledge of the employer. *E.g., Howard Manufacturing Co.*, 219 N.L.R.B. 638 (1975); *Hill Road Convalescent Hospital, Inc.*, 217 N.L.R.B. 460 (1975). The Courts of Appeals have agreed because the existence and interpretation of the law are a "matter of general knowledge." *NLRB v. Claxton Poultry Co., Inc.*, 581 F.2d 1133, 1136 (5th Cir. 1978).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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February 25, 1981

APPENDIX

APPENDIX A

NO. 79-1176

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ROBBINS AND MYERS, INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

ORDER

(Filed December 11, 1980)

BEFORE: LIVELY, ENGEL and KEITH, Circuit Judges.

This matter is before the court on a petition to review and set aside an order of the National Labor Relations Board and a cross-application of the Board for enforcement of its order. The only issue is whether a pre-election speech by the employer's plant manager contained substantial misrepresentations reasonably expected to have a significant impact on the election as found by the Board in setting aside the election which was won by the employer. The Supplemental Decision and Order which we now review is reported at 241 NLRB No. 11.

The Board found three serious misrepresentations in the pre-election speech and concluded that the election should be set aside on the basis of *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962). In addition to finding three serious misrepresentations, the Board concluded

that the cumulative effect of these misrepresentations was significant, even though any one of them standing alone might not have been sufficient grounds for setting aside the election.

The pre-election speech was given by the plant manager to small groups of employees over a period of approximately six hours, with the last speech being given at least twenty-four hours before the election. The Board also found that the union did not have a reasonable opportunity to reply.

After review of the record and careful consideration of the briefs and oral arguments of counsel the court concludes that the findings of the Board are supported by substantial evidence and that the Board did not depart from the requirements of controlling law in determining to set aside the election.

The petitioner also complains that "laboratory conditions" were not maintained at the third election conducted by the Board following its order to set aside the previous election. However, our review of the record discloses no such circumstances which would require the Board to set aside the third election.

The petition for review is denied and the cross-application for enforcement of the order of the Board is granted.

Entered by Order of the Court
/s/ John P. Hehman
Clerk

APPENDIX B

241 NLRB No. 11

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 9-CA-10296

ROBBINS & MYERS, INC.

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

SUPPLEMENTAL DECISION AND ORDER

(March 16, 1979)

On October 21, 1976, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding in which it found that Respondent has engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, and ordered Respondent to cease and desist therefrom, and to take certain affirmative action to remedy such unfair labor practices.[1]

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1. 226 NLRB 544 (1976). Respondent's defense to the unfair labor practice allegation was that the United Steelworkers of America, AFL-CIO-CLC, herein the Union, had not been properly certified as the bargaining representative and, thus, Respondent had no duty to bargain with it. The Board granted the General Counsel's Motion for Summary Judgment on the ground that Respondent's defense only raised issues that had already been litigated and resolved in the underlying representation case.

(Continued on following page)

Respondent thereupon petitioned the United States Court of Appeals for the Sixth Circuit to review the order of the Board, contending that the Board's order should be set aside upon the ground that the order is based on an invalid certification. Respondent argued that the Board had improperly sustained the Union's objections to the second election in which the majority of the employees had voted against union representation, had improperly overruled Respondent's objections to the third election, and, thus, had improperly certified the Union. The Board filed a cross-application for enforcement of its Order. On June 20, 1978, the court issued its decision[2] in which it reversed the Board's finding that certain of the Union's objections to

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Footnote continued—

The following is a brief summary of the proceedings in the underlying representation case. See 226 NLRB at 544-545 for a more complete discussion. The underlying representation case was initiated by the Union when it filed a petition with the Board seeking to represent the production and maintenance employees at Respondent's Gallipolis, Ohio, plant. Three representation elections were held. On February 21, 1974, in the first election, a majority of the employees voting cast their ballots for the Union. On October 29, 1974, the Board issued a decision adopting the Hearing Officer's report which recommended that one of Respondent's objections be sustained and that a second election be directed. On November 27, 1974, a second election was held and a majority of the employees voting cast their ballots against representation by the Union. On June 20, 1975, the Board issued a decision adopting in part the Regional Director's findings and recommendations with regard to the Union's objections, and directed a third election. On September 25, 1975, a third election was held and the Union received a majority of the votes cast. On April 6, 1976, the Board issued its Decision and Certification of Representative in which it adopted the Regional Director's findings and recommendations that Respondent's objections be overruled and the Union be certified as the exclusive collective-bargaining representative.

On May 5, 1976, the Union filed a charge alleging that Respondent had violated Sec. 8(a)(1) and (5) of the Act by refusing to bargain with the Union and, on June 3, 1976, the General Counsel issued the complaint in this proceeding alleging the same.

2. *Robbins & Myers, Inc. v. N.L.R.B.*, 577 F.2d 382 (6th Cir. 1978).

conduct affecting the results of the second election warranted setting aside the election and remanded the case to the Board for consideration of the remaining objections to the second election which the Board had found unnecessary to decide in the first instance.

On August 29, 1978, the Board advised the parties that it had decided to accept the remand and that they might submit statements of position with respect to the issues raised by the remand. Thereafter, Respondent filed a statement of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On remand, the sole issue before us is whether in light of the court's decision the second election was properly set aside. The Union filed five objections to conduct affecting the results of the second election. The Regional Director in his Report on Objections to Second Election and Recommendations to the Board recommended that portions of the Union's first, third, and fifth objections should be sustained, that the second election should be set aside, and that a third election should be directed. The Board adopted the Regional Director's recommendation that a new election be directed, but a majority of the panel found it unnecessary to consider the issues raised by the Union's Objection 5 since the conduct embraced by Objection 1[3] was sufficiently serious to warrant setting aside the election. As stated above, the court disagreed with this finding of the Board. Accordingly, on remand only Objection 5 remains before us for consideration.

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3. Objection 3 alleged as objectionable threats and promises essentially identical to those raised in Objection 1 and thus were considered together by the Regional Director and the Board.

In his investigation of the Union's Objection 5, the Regional Director examined the contents of a speech which Respondent's president, Hennessey, made to different groups of employees the day before the election, on company property, and during working hours.[4] The Regional Director found that certain statements in the speech constituted objectionable conduct sufficient to set aside he election. Specifically, the Regional Director found that three passages constituted misrepresentations involving substantial departures from the truth at a time which prevented the Union from making an effective reply, and that such misrepresentations could reasonably be expected to have had a significant impact on the election. Accordingly, applying the standard enunciated in *Hollywood Ceramics Company, Inc.*,[5] the Regional Director recommended setting aside the election.

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4. In Objection 5 the Union alleged that in addition to the conduct specified in Objections 1-4, Respondent by "other acts and conduct" interfered with the election. The Regional Director found that the evidence offered by the Union in support of its allegations in Objection 5 was insufficient to establish objectionable conduct.

However, as noted above, the Regional Director also examined the text of a speech delivered by Respondent's president and found certain statements to be objectionable misrepresentations. Although the Union had referred to that speech in another objection and had only complained of certain alleged threats and promises of benefits, the Regional Director was "not required to, nor [could] he properly ignore evidence relevant to the conduct of the election . . . simply because the Union may not have specifically mentioned such conduct in its objections." *American Safety Equipment Corporation*, 234 NLRB No. 95 (1978).

5. 140 NLRB 221, 224 (1960). Respondent's contention that *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), is dispositive of the issues here is without merit. In *General Knit of California, Inc.*, 239 NLRB No. 101 (1978), the Board overruled *Shopping Kart* and returned to the standard for review of campaign propaganda as expressed in *Hollywood Ceramics*. Furthermore, since both the representation and unfair labor practice proceedings in this case were originally decided under the principles enunciated in *Hollywood Ceramics* there is no basis for applying *Shopping Kart* on remand. *Blackman-Uhler Chemical Division-Synalloy Corporation*, 239 NLRB No. 102 (1978).

The first passage involved Respondent's characterization of the employees' right to oust the Union once they had selected it as their collective-bargaining representative:

> What the pushers have not told you, and hope you do not realize, is that once a union gets in, there is basically no turning back—you are stuck with it from then on.

The Regional Director found this passage objectionable in that it misled the employees as to their right, as provided in Section 9(c) of the Act, to petition for an election to decertify a union.

Respondent argues that the statement is not misleading since it does not purport to be a full description of Section 9(c) and in view of the success rates of decertification petitions, it merely states the reality that "basically" unions are rarely ousted. Finally, Respondent contends that the Board has held to be unobjectionable stronger statements on the same subject.

We agree with the Regional Director. Section 9(c) of the Act provides employees with a clear and unmistakable right to oust a union as their collective-bargaining representative. Thus, Hennessey's statement that "there is basically no turning back" is obviously misleading. Nor does the use of "basically" significantly lessen the degree of misrepresentation. The right to file a petition to decertify a union is as substantial as the right to file a petition for union representation. The failure to allude to the right to oust a union when coupled with the admonition that "there is basically no turning back" is clearly an attempt to disguise that right and to convey the impression

that employees have little or no recourse against a union with which they have become disaffected.[6]

This misrepresentation could reasonably be expected to have had a significant impact on the election. By misrepresenting the finality of the employees' selection of the Union as their representative, Respondent has unfairly distorted the consequences of making such a decision. Common sense dictates that an irreversible decision will be approached with greater caution. Any hesitation or reluctance to vote for union representation will naturally be increased when the risk of making that decision is exaggerated by the spectre of an unbreakable commitment. Similarly, presenting the decision to vote for union representation as irreversible also affects the employees' ability to evaluate other election propaganda. Employer suggestions as to the deficiencies of union representation which otherwise might be dismissed in light of the opportunity to later oust the union if those allegations prove to be true are not so easily disregarded when that opportunity does not exist.

Finally, as a part of one of Respondent's central themes in the speech this misrepresentation is especially influential Hennessey's concluding message is that the employees should give management another year without the Union. This appeal is clearly more attractive in the context of the distorted picture of the alternatives that Respondent had presented to the employees: one more year with management or forever with the Union.

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6. *Northlake Convalescent Hospital*, 173 NLRB 992 (1968), which is relied on by Respondent, is distinguishable from this case. In *Northlake*, the Board found the allegedly objectionable statement to be "ambiguous and [to] not constitute such a misrepresentation as would impair a free expression of choice by the employees." In contrast, the statement in this case clearly and unambiguously conveys the impression that the employee's choice of representative is irreversible.

The second objectionable passage involved the rights of employees to communicate with their employer once they are represented by a union:

> A union is nothing more than an outsider. When this outsider comes on the scene the employees lose all rights for direct communication with the Company.

The Regional Director found that this statement misrepresented the rights provided in Section 9(a) of the Act. Respondent contends that Board precedent has permitted similar and stronger statements by other employers.[7]

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7. The cases cited by Respondent are not dispositive of the issue before us for two reasons. First, Hennessey's statement is stronger and broader than any statement in those cases. His comments were in complete contradiction to the right provided by statute. His misrepresentation was unambiguously extreme both in stating individual rights were completely eliminated and in extending this restriction generally to communication with the employer.

Second, none of the cases cited by Respondent nor related precedent specifically address the issue which is presented here. In those cases, the Board analyzed the statements, which described the right of individual employees to directly communicate with their employer, in terms of whether the employer was threatening to bar such access in retaliation for selecting union representation or whether the employer was merely predicting the future reality of a grievance procedure once a union is involved. Compare *Han-Dee Pak, Inc.*, 232 NLRB No. 71 (1977), and *Graber Manufacturing Company, Inc.*, 158 NLRB 244, 246-247 (1966), enfd. 382 F.2d 990 (6th Cir. 1967); with *Worzalla Publishing Co., d/b/a National Bookbinding Co.*, 171 NLRB 219, 220 (1968), and *Westmont Engineering Co.*, 170 NLRB 13 (1968). In these cases in which the statements were found to constitute threats, the Board determined that by distorting the employees' right under Sec. 9(a) of the Act the employer was not simply describing the future, but instead was implicitly indicating that, regardless of the statutory right, it would deny the employees the benefit of direct access if they chose union representation. See *Cosmo Graphics, Inc.*, 217 NLRB 1061, 1065 (1975); *Jacob Wiesel d/b/a Saticoy Meat Packing Co.*, 182 NLRB 713, 714 (1970); *Tunica Manufacturing Company, Inc.*, 182 NLRB 729, 740 (1970); *Henry I. Siegel Co., Inc.*, 172 NLRB 825, 837 (1968), enfd. in pertinent part 417 F.2d 1206, 1215 (6th Cir. 1969). *Bradenburg Telephone Company*, 164 NLRB 825, 833-834 (1967), enfd. in pertinent part 408 F.2d 377 (6th Cir. 1969). However, in the absence of

(Continued on following page)

The first proviso to Section 9(a) of the Act emphatically reserves to employees the right "to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative." Hennessey's statement flatly declares otherwise stating that "*all* rights for *direct* communication" (emphasis supplied) are lost. Thus, we agree with the Regional Director that Hennessey's statement constitutes a misrepresentation involving a substantial departure from the truth.

That this misrepresentation is one which could reasonably be said to have a significant impact on the election is also clear. By its very nature, a representation election involves the decision whether to sacrifice certain individual rights and interests in favor of collective action and representation by a union. Certainly the extent to

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Footnote continued—

other evidence of coercion, the Board has been reluctant to find similar statements to constitute coercive threats. See *Allied Stores of New York, Inc., d/b/a Gertz*, 197 NLRB 718, 723 (1972); *C & K Coal Company*, 195 NLRB 1038, 1039 (1972); *Bostitch Division of Textron, Inc.*, 176 NLRB 377, 379 (1969); but see *James Hotel Company, a Corporation d/b/a Skirvin Hotel and Skirvin Tower*, 142 NLRB 761, 763 (1963) (statement was not as strong a misstatement of the law).

In none of these decisions did the Board consider, as we are asked to do in this case, whether the statement, even if not a threat, was objectionable in view of the standards of conduct for campaign statements set forth in *Hollywood Ceramics, supra*, and recently reaffirmed in *General Knit, supra*. Although clearly interrelated in this case, the determination of whether a statement constitutes a threat or an objectionable misrepresentation involves different inquiries and reflects different concerns. In the former analysis, the focus of consideration is whether the employees' free choice has been interfered with by improperly attaching a penalty to the exercise of that choice. In the latter approach, however, the question is whether the employees' free choice has been interfered with by the improper misrepresentation of some fact on which the employees might base their choice. Thus, that statements in the cases relied on by Respondent were found not to be threats to withdraw the benefit of direct access to management is not dispositive of the issue here since it is the distortion of relevant information that constitutes the interference in this case and not the implied threat of retaliatory action.

which the Act has preserved the rights of individual employees even after a union has been selected is a matter of great concern to the employees in the process of making that decision. Thus, Respondent's misrepresentation impacts directly on the employees' evaluation of an important consideration in the election by erroneously exaggerating the extent to which the employees lose their individual rights to the collective representative.

The final objectionable passage purported to describe the union-security provision that the union would be likely to demand:

> If the union is elected, there are usually two things that they go after:
>
> 1. The first thing they go after is a closed shop. Closed shop means that the Company agrees that no non-union (Non-excluded) employees will be employed by the Company—that everyone is union.

The Regional Director found that this statement constitutes a material misrepresentation since "presumably the Petitioner would not seek an unlawful union security contractual provision—i.e., a 'closed shop.'" Respondent argues that the use of closed shop is layman's terminology for a permissible union-security provision and that Board precedent has found the use of the term unobjectionable.

Contrary to Respondent's characterization, however, the statement in this case went beyond merely referring to a permissible union-security provision as a closed shop.[8] Hennessey's statement warns clearly that only union people will be employed by Respondent under the closed shop. Of course, this representation is substantially incorrect in two important respects. First, new employees need not

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8. On this basis, the case cited by Respondent, *Pollock Mill Co.*, 104 NLRB 227, 230 (1953), is distinguishable.

be union members and are entitled to a 30-day grace period before being required to pay any dues or fees. Second, all employees are only required to meet their financial core obligations and need not become members of the Union. Thus, we conclude that Hennessey's statement is a substantial misrepresentation.[9]

We also agree with the Regional Director's judgment that such a misrepresentation could reasonably be said to have a significant impact on the election. The implication of Hennessey's statement is that the Union will seek a closed-shop provision under which an employee would lose his job if he insisted on his right to refrain from becoming a union member. This misstatement leaves the impression with the employees that if they exercise a protected right they risk losing their jobs. Accordingly, we conclude that the employees are likely to be influenced by it.

In summary, these misrepresentations distorted the consequences of voting for the Union. The employees were left with the impression that a vote for a union is irreversible, that once a union is selected the employees are excluded from contact with the employer, and that the employees' job security is dependent on full union

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9. The degree of misrepresentation is increased by Hennessey's subsequent statements concerning the dues-checkoff authorizations:

> 2. The second thing the union goes after is a simple thing called dues check-off. This simply means that the Company will take out of your check any dues, fines, or assessments, as defined by the union, without question.

By not indicating that dues-checkoff provisions are voluntary and by stating that fines and assessments will be collected through the checkoff, Hennessey implied that employees will automatically be subject to union discipline as enforced through fines and assessments. Thus, his comments reinforced the impression left by his closed-shop remarks that actual membership in the union will be required as a condition of employment.

membership and thus is subject to union discipline. The misrepresentations came from a credible source, Respondent's president, and were made to several groups of employees comprising a large majority of the unit population,[10] and occurred the day before the election at a time when the Union did not have an opportunity to make an effective response and when the impact of the statements would be greatest.

Although we recognize that in some circumstances each of the misrepresentations made here might not warrant setting aside the election, we conclude that in this case, for the reasons stated above, these misrepresentations occurring together are a proper basis for setting aside the second election. Accordingly, we hereby reaffirm our prior findings that the Union was properly certified and that Respondent violated Section 8(a)(1) and (5) by its refusal to bargain.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms as its Order the Order heretofore entered in this proceeding on October 21, 1976.

Dated, Washington, D.C. March 16, 1979

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
(Seal) National Labor Relations Board

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10. In its defense to the Union's Objection 2, Respondent indicated that Hennessey spoke to most of the employee complement the morning of the day before the election.

MEMBER PENELLO, dissenting:

I find no grounds for setting aside the second election on the basis of the three alleged misrepresentations.[11] As noted in my dissenting opinion in *General Knit of California, Inc.*, 239 NLRB No. 101 (1978), I adhere to the sound principles of *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977). Accordingly, I would overrule the Union's Objection 5, certify the results of the second election, and dismiss the complaint in its entirety.

Dated, Washington, D.C. March 16, 1979

John A. Penello, Member
National Labor Relations Board

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11. Although the statements found objectionable by the majority were not specifically alleged as such in the Union's Objection 5, I nevertheless agree with the majority that those statements were properly before the Regional Director and the Board since other portions of the same speech were the subject of specific objections. See my concurring opinion in *American Safety Equipment Corporation*, 234 NLRB No. 95 (1978).

APPENDIX C

PREPARED TEXT FOR 24-HOUR TALK—
NOVEMBER 25, 1974
ROBBINS & MYERS—GALLIPOLIS, OHIO

I have something that I would like to say to you that I would like you to weigh before you vote next Wednesday, concerning whether this plant remains non-union or becomes unionized. I have a true concern for what can happen to this plant if it becomes unionized, but even more so, I have a concern for you because you are being asked to vote on an item that may effect your lives in a manner which you may have never anticipated. The pushers of the union are saying "Why not give the union a chance?"—and you may say, "What the heck why not?" What the pushers have not told you, and hope you do not realize, is that once a union gets in there is basically no turning back - - - you are stuck with it from then on. I am truly concerned that you may not recognize this fact and of an eventual unsatisfactory change that will occur, should we be unionized.

I think it is very important that you understand:

WHAT IS A UNION

A union is nothing more than an outsider. When this outsider comes on the scene the employees lose all rights for direct communication with the Company. If the union comes in, the final negotiated contract is between the Company and the International Union. You, or your local would have no authority to enter into a contract with the Company. By law, our dealings are with the International Union.

ROBBINS & MYERS WORKING CONDITIONS

R&M is a good, safe, and clean place to work. When you came here you were looking for a job and were happy to get a job. Now many of you are saying, or are being told, "Boy! This is a bad place to work - - - better get a union in here to straighten it out." R&M is not a bad place to work. You know what, there are hundreds and hundreds of people just waiting to get your job. If you don't believe me, why don't one of you come forth right now and quit, and I'll demonstrate how quickly I can get your replacement.

UNION PUSHER LIES

Many of you are being fed a pack of lies about the great things the union is going to do for you when it gets in. The union can do nothing for you without the Company's consent. If it could, then I ask you to tell me why the Coal Workers and West Virginia Malleable are out on strike, and why is the Springfield plant of R&M on strike for its ninth week. The reason is that the union can't deliver anything unless the Company agrees. And if you really believe that the union can do all the fantastic things that it says, then you're not being honest with yourself.

Have you heard the statement said yet, "Wait until the union gets in here and they tell Hennessey what to do and how to run this plant." Let me tell you something—most of you have seen only one side of me. Some of you might interpret me as being an easy-going guy, you may think I am a patsy, but I want you to thing about something. This Gallipolis plant represents an enormous responsibility that has many many pressures. Do you think that a company the size of R&M would put me down here if they didn't think I could do the job? You

better believe they wouldn't. Within your own group you have got the pushers of the union. The big mouths who tell you what they are going to do; the ones that have all the factual BS made up of half truths and out-and-out lies. Many of them don't even know they are lying—since they are only repeating the half truths and lies they may have been told. I want you to think about those people. I want you to recognize them for what they are, and I want you to recognize me for what I am, and then I want to ask you how do you think these people would do against me on a one-on-one situation? Do you really think these big mouths have your best interests at heart?

MOTIVES BEHIND PUSHERS

Have you ever questioned the motives behind why some of the big pushers are pushing this union? Why they want it in here? What's in it for them? Have you ever questioned why these people claim to be your co-workers? Many of these people live in fine houses with a good view, have husbands who have good jobs, and they do not need to work like many of you do. Have you ever questioned why these people really tell you they want a union? Think about that. Do they really care about you and how you are treated, or are they trying to give some importance to their own lives by being an official in a union that will negotiate with the Company? And are they doing this at your expense? Is it going to hurt these people who do not have to work to take you out on strike?

WHY DO STEELWORKERS WANT TO ORGANIZE THIS PLANT

Have you ever questioned why the Steelworkers are so interested in organizing this plant? If you think its to get *you* more money, a week off at Christmas, more paid vacation, and less hours per week, you really should think again. You are no more than a warm body with a number to them. Would you believe that on an average, each one of you is going to pay $75 + a year in dues to this union. Would you believe they are going to come in here and take out $30 to 35 thousand a year of your money. Do you think it makes any difference to them whether you lose your job or not? As far as they are concerned, you will be replaced by another dues payer. Do you think that it makes any difference to them whether R&M remains competitive? Do you think they really care about your long term interest with this Company or the long term interest of R&M at Gallipolis? No, they don't care, and neither do the pushers. They are only out after their own selfish motives - - - power and money.

WHAT IS A STRIKE

Many of you really have no idea what a union is like. Many of you don't know what a strike is, or what a strike is like. A strike comes about when a Company doesn't agree to do what the union asks. Such as: we would not agree to a closed shop, or the basic steel contract. When the Company does not agree with the union, the union says, "We are going to take all your employees out on strike." Are the officials of the union hurt when you are out on strike? No, because the dues you paid will pay their salaries. You really don't know what a strike is like, but I'll tell you how you can find out without

actually going on strike. For the next (10) weeks when you get your paycheck, tear it up and throw it in the trash, so you don't have any of that money. Then go borrow $10 or $20 from a friend, and live on that for that week. Try to buy your kids their shoes, the clothing that is needed, and the food that you can afford. And when your next paycheck comes, tear that one up and do the same thing over again. Remember, you are not eligible for unemployment compensation when you are on strike. The people in Springfield have been literally doing this for the last nine (9) weeks. Oh, by the way, every Saturday stand outside all day in the cold, wet, damp weather and pretend you are on picket duty. Maybe every once in a while you can sit in your car and try to keep warm. You think I am kidding, why don't you try to live for nine (9) weeks without a paycheck. That is what the people in Springfield and Point Pleasant are doing. Oh yes, the union provides strike pay, doesn't it? I hear it pays up to $50 a week. Do you really believe that? How about $10 to $20 a week? The pushers are going to say Hennessey doesn't know what he is talking about. Do you think the pushers are going to tell you the truth? The pushers may tell you not to worry about the payments on your car, house and furniture—the union will take care of that for you. Do you believe that? If you do, then you are in trouble, because you know what? The union can't afford to do that. If it could, then why doesn't it come out in big print and say, "If you go out on strike we pay all your payments." It is not going to be that foolish—but it sure as hell hopes that you are.

SENIORITY PLAN & DISCIPLINARY PROCEDURES

No seniority plan is perfect. It makes no difference what seniority plan is followed, you would find 5 or 10% of the employees have always got a complaint. Our seniority plan is not perfect. It does have some problems. But they are not the kinds of problems that need a third party—the union to help us solve them. It is basically a workable system.

Have you heard the rumor that if the union gets in you cannot get fired, you cannot get terminated, you cannot get moved around from department to department, you cannot get layed (sic) off, and if your Foreman tells you to do something, you can tell him to go to hell, you don't want to do it, and who knows what else you are being told? We don't abuse any of the disciplinary procedures that are available. Our Foremen do not fire people just because they feel like it. There are specific steps that they must go through, and I and the Manufacturing Superintendent are sure that they are met. We do not terminate for unjust causes, and we have gone that extra step to avoid lay-off, when a lay-off would have been the easiest answer. You know that—and I know that. And just because a union would get in here is no reason why we would change the way we operate. There is no union that can make us change, because all the union can do is ask the Company to change their procedures, which we may or may not agree to do. The only thing a union can do is disagree and go out on strike. That gets you back to no paycheck, no money for payments, standing outside on Saturdays and Sundays, and we already discussed all of those fantastic advantages that the union offers. I'll give you an example of how the union can control what a company can and can't do. Have you heard that Chrysler is going to shut down all their plants

during December, and lay off all their people just before Christmas? No union can stop them from doing that. Have you read about how General Motors and Ford have thousands and thousands of people layed (sic) off, and no union is stopping them from doing that either.

Perhaps many of you hear what I say and maybe you don't believe me. Many of you have been fed the line of union bologna that the Company will not take a strike. They are afraid of us. They will give us what we ask for. So we are going to ask for paid lunch hours, a week off at Christmas, etc. They are going to give us this when we get a union. Do you really believe that? Let me tell you something—the employees in Springfield have been out on strike for nine (9) weeks. The Company does not agree with what the union asks for and they have not accepted what the union wants. Nine weeks on strike doesn't sound like the Company is afraid of them to me—does it to you?

NEGOTIABLE ITEMS

There are a number of things that I think you need to understand about what is going to happen if a union is elected on November 27. First of all, we normally announce our annual wage and fringe benefit adjustment just before Christmas, with these improvements taking effect the first of January. If the union is not elected as your representative, we would be free to do as we have done in the past. If the union is elected, then all wages, benefits, hours of work, etc. are negotiable with the International Union. Mind you, I did not say the employees - - - I said the International Union. Don't be misled into thinking that union negotiators will keep what you presently have and build on that. Everything is negotiable. If the union were elected, the Company

may have legal grounds to object to the union's activity during the election, which may result in the NLRB ordering a third election to be held. Keep in mind that this election is taking place approximately (9) months after the first election. If the union is elected, there are usually two things that they go after:

1. The first thing they go after is closed shop. Closed shop means that the Company agrees that no non-union (Non-excluded) employees will be employed by the Company—that everyone is union.

2. The second thing the union goes after is a simple thing called dues check-off. This simply means that the Company will take out of your check any dues, fines, or assessments, as defined by the union, without question. The next thing you might ask is why would the union want that. First of all, without a closed shop the union has no power. They cannot afford to allow employees of the Company not to belong to the union. The reason that they want dues check-off is because they personally do not want to chase around four or five counties trying to get dues and fines and assessments from the employees. It is much easier when the Company sends a check to them each month. They want this so badly that they might trade away many things that you presently have—like part of your hospitalization plan, part of your vacation program, part of your wages and part of your progression system. Who knows what they would trade away. I don't—do you?

There are a number of things that I ask you to remember:

1. It is important that everyone vote. The winner is determined by the majority of those voting.

2. The Government conducts a secret ballot election, so no one knows how you vote.

3. No employee is obligated to vote one way or another because they signed a card or they voted that way before. You can vote in this election however you please in complete secrecy.

In conclusion, let me add a personal note. I have been here almost a year and a half—my family and I live here and we like it here. I think that all of us here in Gallipolis have a real stake in the future together. I think that future will be brighter without outsiders. Please give this management a year's Vote of confidence—when a year is up, you can always vote a union back in, if that is what you really want. It will always be ready to take your dues.

Let's try it together for a year—you have nothing to lose, and possibly a lot to gain.

Thank you.

No. 80-1451

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ALEXAND

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBBINS & MYERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that statements made in a speech delivered by petitioner's plant manager to assembled employees 24 hours before a representation election were sufficiently serious misrepresentations to justify setting aside the election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A2) is unreported. The supplemental decision and order of the National Labor Relations Board (Pet. App. A3-A14) are reported at 241 N.L.R.B. 102.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1980. The petition for a writ of certiorari was filed on February 25, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the petition (Pet. 2-4). Also relevant are the following provisions of the Act:

Section 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

In late 1973, the United Steelworkers of America, AFL-CIO-CLC, began an organizing drive at the petitioner's plant in Gallipolis, Ohio. The Union won the representation election held on February 21, 1974, but the Board set aside the election because of union misconduct. A second election was held on November 27, 1974, and the Union lost. Because of misconduct by petitioner, however, the Board ordered the second election set aside and directed that a third election be held. The third election, held on September 25, 1975, was won by the Union and the Board certified the Union as the employees' collective bargaining representative. (Pet. App. A4 n.1).

When petitioner refused the Union's subsequent request to bargain, the Union filed a charge with the Board alleging that the refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. A4 n.1). Petitioner defended its refusal to bargain by claiming, *inter alia*, that the Board had erred in setting aside the second election and that the Board's certification of the Union on the basis of the third election was therefore improper.

The Board set aside the second election under the principles established in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962), because it found that petitioner's plant

manager Hennessey had made material misrepresentations during a speech to the employees the day before the election (Pet. App. A3-A13).[1] While urging the employees to give petitioner one more year without the Union, Hennessey told them that (1) once they selected a union they would be "stuck with it" forever (Pet. App. A7), (2) employees would not be able to communicate directly with the Company (Pet. App. A9), and (3) only union members could work for petitioner (Pet. App. A11).

Under Section 9(c) of the Act, 29 U.S.C. 159(c), employees are guaranteed the right to decertify a union. The Board concluded (Pet. App. A8), therefore, that Hennessey's first statement was a significant "misrepresentation [that] could reasonably be expected to have had a significant impact on the election," especially since petitioner had urged that the "employees should give [petitioner] another year without the Union." The Board explained (*ibid.*):

> By misrepresenting the finality of the employees' selection of the Union as their representative, Respondent has unfairly distorted the consequences of making such a decision. Common sense dictates that an irreversible decision will be approached with greater caution. Any hesitation or reluctance to vote for union representation will naturally be increased when the risk of making that decision is exaggerated by the spectre of an unbreakable commitment. Similarly, presenting the

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[1]The Board initially set aside the second election because it found that petitioner had impliedly threatened the employees. In so ruling, the Board expressly reserved judgment on whether the election should also be set aside because of petitioner's misrepresentations. On review, the Sixth Circuit rejected the Board's finding of implied threats and remanded for consideration of the petitioner's alleged misrepresentations. *Robbins & Myers, Inc.* v. *NLRB*, 577 F. 2d 382 (1978), remanding 226 N.L.R.B. 544 (1976). It is the Board's decision on remand that is the subject of this case.

> decision to vote for union representation as irreversible also affects the employees' ability to evaluate other election propaganda. Employer suggestions as to the deficiencies of union representation which otherwise might be dismissed in light of the opportunity to later oust the union if those allegations prove to be true are not so easily disregarded when that opportunity does not exist.
>
> * * * This appeal is clearly more attractive in the context of the distorted picture of the alternatives that Respondent had presented to the employees: one more year with management or forever with the Union.

The second statement misrepresented the employees' right to present individual grievances to their employer without the intervention of their union as guaranteed by Section 9(a) of the Act. The Board explained why this misrepresentation could have had a serious impact on the election (Pet. App. A10-A11):

> By its very nature, a representation election involves the decision whether to sacrifice certain individual rights and interests in favor of collective action and representation by a union. Certainly the extent to which the Act has preserved the rights of individual employees even after a union has been selected is a matter of great concern to the employees in the process of making that decision. Thus, Respondent's misrepresentation impacts directly on the employees' evaluation of an important consideration in the election by erroneously exaggerating the extent to which the employees lose their individual rights to the collective representative.

The third misrepresentation informed employees that only union members would be employed at petitioner's plant if the Union prevailed. The Board rejected petitioner's

assertion that this language merely referred to "a permissible union-security provision" (Pet. App. A11). The Board explained (Pet. App. A11-A12; footnote omitted):

> Contrary to [petitioner's] characterization, however, the statement in this case went beyond merely referring to a permissible union-security provision as a closed shop. Hennessey's statement warns clearly that only union people will be employed by [petitioner] under the closed shop. Of course, this representation is substantially incorrect in two important respects. First, new employees need not be union members and are entitled to a 30-day grace period before being required to pay any dues or fees. Second, all employees are only required to meet their financial core obligations and need not become members of the Union.

The Board found that the cumulative effect of these misrepresentations by top management immediately before the election, when the Union had no opportunity to reply, was impermissibly to "distort[ ] the consequences of voting for the Union" (Pet. App. A12). The Board explained (Pet. App. A12-A13):

> The employees were left with the impression that a vote for a union is irreversible, that once a union is selected the employees are excluded from contact with the employer, and that the employees' job security is dependent on full union membership and thus is subject to union discipline.

Accordingly, the Board concluded that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (Pet. App. A13) and ordered petitioner to bargain with the Union (*ibid.*).

The court of appeals, in a per curiam order, enforced the Board's order, finding that "substantial evidence" supported the Board's finding that Hennessey's speech "con-

tained substantial misrepresentations reasonably expected to have a significant impact on the election. * * *" (Pet. App. A1-A2).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decisions of this Court or of the other courts of appeals.

Petitioner contends that the Board's decision requires an employer that discusses employee rights during an organizing campaign to "present[ ] a detailed discussion of all arguably related statutory rights and benefits provided under the Act" (Pet. 7). The Board set aside the second election, however, not because petitioner failed to give a complete and detailed discussion of employee rights under the Act, but because it misrepresented the statutory rights that it chose to discuss. The cases relied on by petitioner (Pet. 7-8) do not support its contention that such misrepresentations are privileged under Section 8(c) of the Act.[2]

There is no merit in petitioner's further contention (Pet. 10-11) that its statement that unionized employees lose all right to communicate with their employer is consistent with the holdings in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), and *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 61 n.12 (1975). The statement quoted from *Allis-Chalmers* (Pet. 10) concerns the bargaining representative's exclusive right to

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[2]Neither *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966), nor *National Association of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974), provides any support for petitioner in this case. In both cases the Court only considered the extent to which federal labor law limited the application of state libel and slander laws. The language petitioner cites (Pet. 8) from *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), deals not with election misrepresentations, but with the standards for evaluating whether employer statements are coercive and therefore violative of Section 8(a)(1) of the Act.

bargain about the grievance processing mechanism and not with the employees' independent right under Section 9(a) of the Act to present grievances to their employer. The statement quoted from *Emporium* (Pet. 10-11) explains that an employer may refuse to entertain an employee's individual grievance presentation; it does not stand for the proposition that unionization limits the right of the employee to present, or the employer to entertain, individual grievances.[3]

Contrary to petitioner's assertion (Pet. 12-13), the court's decision here does not conflict with *Melrose-Wakefield Hospital Ass'n* v. *NLRB*, 615 F. 2d 563 (1st Cir. 1980). There the court agreed with the Board that the employer's "multiple inadequate objections" could not be aggregated

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[3]As the Board noted (Pet. App. A9-A10 n.7), the cases cited by petitioner (Pet. 11 nn.4, 5) deal with the question whether the employer violated Section 8(a)(1) of the Act by threatening to refuse to entertain grievances presented by individual employees, not with whether it is a misrepresentation to tell employees they have no right to approach their employer if unionized.

Similarly, the Board explained (Pet. App. A11 n.8) that, in *Pollock Mill Co.*, 104 N.L.R.B. 227 (1953) (Pet. 11 n.6), the employer "merely referr[ed] to a permissible union-security provision as a closed shop" but did not, as here, distort what such a provision entailed. In *Big "D" Mining*, 222 N.L.R.B. 522, 523 (1976) (Pet. 12 n.7), the Board found that the employer's description of the union-security clause contained in the union's national constitution was not so misleading as to warrant setting aside the election. In *Montana Lumber Sales Inc.*, 185 N.L.R.B. 46, 49 (1970) (Pet. 12 n.7), the Board found no substantial misrepresentation in the employer's description of the effect of a union-security clause. And, in *Edward A. Utlaut Memorial Hospital*, 249 N.L.R.B 1153, 1158 (1980) (Pet. 12 n.7), the Board, citing the instant case, found a misrepresentation about joining the union to be a valid objection to the results of the election.

The Board (Pet. App. A8 n.6) also distinguished, on its facts, *Northlake Convalescent Home*, 173 N.L.R.B. 992 (1968) (Pet. 9-10). There the employer's remark was tied to the finality of a vote, stating that an employee could not "withdraw or change" the way he voted. In that context the Board found the employer's statement that "once you vote, you will have had your only chance to assert the personal freedom which you now enjoy" to be "ambiguous."

to provide sufficient grounds to set aside the election (*id.* at 570). Moreover, the court in *Melrose-Wakefield* acknowledged that "the Board can conclude * * * that a 'systematic pattern of activity', involving misrepresentations or coercion, requires invalidation of an election even when no single act so requires" (*ibid.*; citation omitted). Here, the court sustained the Board's finding that each of petitioner's statements was a "serious misrepresentation[]" (Pet. App. A1).

In sum, the only question presented in this case is whether the Board properly concluded that petitioner's misrepresentations could "reasonably be expected to have a significant impact on the election." *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962).[4] That issue, which turns on the particular facts here, does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as the facts of this case make plain, the Board's conclusion was reasonable.

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[4]In *Hollywood Ceramics*, the Board explained that, in determining whether the permissible limits of campaign propaganda had been exceeded, it would consider such criteria as: (1) whether there is a misrepresentation of a material fact involving a substantial departure from the truth; (2) whether the other party had an opportunity to make an effective reply; (3) whether the misrepresentation comes from a party who has special knowledge of, or was in position to know, the true facts; and (4) whether the misrepresentation relates to matters within the independent knowledge of the employees so that they are able effectively to evaluate the propaganda. 140 N.L.R.B. at 224.

Petitioner does not challenge the application of the *Hollywood Ceramics* test here. Petitioner misstates the test, however, when it asserts (Pet. 13-14) that it requires that an election be set aside only if the alleged misrepresentation relates to matters exclusively within the knowledge of the party making the statement. That is only one factor the Board considers in assessing the employees' ability to evaluate independently the truth of campaign statements (140 N.L.R.B. at 244 n.10). Here, the record provides no basis for concluding that the employees had independent knowledge that would have allowed them to evaluate petitioner's erroneous statements about their rights under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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